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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~333.~~ 72

STEPHEN L. NEWCOMB, PLAINTIFF IN ERROR,

VS.

JOHN WOOD, ASSIGNEE OF PHILIP E. ROBERTSON, A
BANKRUPT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF OHIO.

FILED DECEMBER 24, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 333.

STEPHEN L. NEWCOMB, PLAINTIFF IN ERROR,

VS.

JOHN WOOD, ASSIGNEE OF PHILIP E. ROBERTSON, A BANKRUPT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

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1 Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the northern district of Ohio, greeting:

Because in the record and proceedings, and also in the rendition of a judgment in a plea, which is in the said circuit court before you, between John Wood, assignee of Philip E. Robertson, bankrupt, in bankruptcy, plaintiff, and Stephen L. Newcomb, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the first Monday in the month of October next, in the said Supreme Court then and there to be held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 7th day of January, in the year of our Lord on' thousand eight hundred and seventy-five, and of the Independence of the United States of America the 99th.

Attest:

[SEAL.]

EARL BILL,
Clerk of Circuit Court aforesaid.

2 NORTHERN DISTRICT OF OHIO, *ss:*

The execution of the within writ of error will appear by the transcript of the record of the within-mentioned judgment & proceedings, duly authenticated, with the citation issued to the said defendant in error, together with the assignment of errors and prayer for reversal by said plaintiff in error; also, a copy of the bond given by said plaintiff in error on the signing of said citation, all of which are hereto annexed and returned herewith.

EARL BILL,
Clerk Circuit Court of the United States for said District.

(Indorsed:) Stephen L. Newcomb, pl'ff in error, vs. John Wood, assignee. Writ of error.

3 THE UNITED STATES OF AMERICA:

Supreme Court of the United States to John Wood, assignee of Philip E. Robertson, in bankruptcy, greeting:

Whereas Stephen L. Newcomb has sued out our writ of error to the circuit court of the United States within and for the northern district of Ohio, directed to remove into the said Supreme Court, to be holden at the city of Washington on the first Monday in the month of October next, the record of a certain plaint, process, proceedings, and judgment,

in an action wherein you, the said John Wood, assignee as aforesaid, in that action lately recovered against the said Stephen L. Newcomb the sum of six thousand three hundred and fifty-six dollars and ninety cents damages and six hundred and eighty-nine dollars and fifteen cents costs of suit, rendered by the district court of the United States within and for said district, and wherein the said circuit court, upon a certain writ of error thereof to the said district court, prosecuted in behalf of said Stephen L. Newcomb against said John Wood, assignee as aforesaid, the said judgment of said district court was affirmed with costs, as by the said record in the said circuit court now remaining appears, in which said record and proceedings, and also in the rendition of the judgment thereupon, manifest error hath intervened, as by the said Stephen L. Newcomb we are informed, and our said writ of error issued and allowed as aforesaid for the purpose of correcting the errors aforesaid
4 alleged, if any there be:

You are therefore hereby commanded and cited to be and appear before the judges of the said Supreme Court, at the city of Washington, at the next term of said court, to be holden on the first Monday in the month of October next, to have the errors aforesaid corrected, and the judgment of our said Supreme Court thereupon.

Witness the honorable Morrison R. Waite, Chief Justice of the United States of America, this 9th day of January, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States of America the ninety-ninth.

[SEAL.] M. WELKER,
Judge of said Circuit Court.

Service of the above and foregoing instrument is hereby acknowledged upon the said John Wood, assignee, & all citation & service in said action is hereby waived, & the appearance of said John Wood, assignee, is entered herein.

Feb'u'y 2d, A. D. 1875.

W. C. COOPER,
Of the Attorneys for John Wood, Assignee.

4½ (Indorsed:) Stephen L. Newcomb vs. John Wood, assignee, &c. Citation in error. Estep & Burke & Olds & Dickey, pl'ff's att'ys.

5 Supreme Court of the United States.

STEPHEN L. NEWCOMB
v.
JOHN WOOD, ASSIGNEE IN BANKRUPTCY, &C. } In error.

The plaintiff in error, Stephen L. Newcomb, comes & says that in the record & proceedings in the circuit court of the United States for the northern district of Ohio in this case there is manifest error, in this, to wit:

1. The said circuit court erred in holding that the district court had jurisdiction to appoint said referees, & in rendering judgment upon the report made.
2. Said circuit court erred in holding said report legal & proper without the referee first being sworn, as required by law.
3. Said circuit court erred in holding said report legal and proper without the same having been signed by all the referees.

4. Said circuit court erred in affirming the judgment of the district court & in refusing to reverse the same.

5. That said judgement was given in favor of the said John Wood, assignee, &c., whereas, by the laws of the land, it ought to have been given in favor of this plaintiff.

6 Wherefore the plaintiff, Stephen L. Newcomb, prays that a citation and supercedeas may issue, and that said judgement of said circuit court may be reversed, & that he may be restored to all things lost thereby, & for other proper relief.

By ESTEP & BURKE &
OLDS & DICKEY,
Pl'ff's Att'ys.

(Indorsed:) Supreme Court. Stephen L. Newcomb v. John Wood, assignee in bankruptcy, &c. Assignment of error. Filed Jan'y 7th, 1875. Earl Bill, clerk. Estep & Burke & Olds & Dickey, pl'ff's att'ys.

7 Know all men by these presents that we, Stephen L. Newcomb, as principal, and Joseph Gunsaulers and Edmund Wright, all of Morrow County, Ohio, as sureties, are held and firmly bound unto John Wood, assignee of Philip E. Robertson, in bankruptcy, in the penal sum of fourteen thousand dollars ($14,000), to the payment whereof well and truly to be made we do by these presents jointly & severally bind ourselves, our heirs, executors, & administrators, sealed with our seals, and dated this 7th day of January, A. D. 1875.

The condition of the above obligation is such that whereas the said Stephen L. Newcomb has sued out of the Supreme Court of the United States a writ of error upon a certain judgment of and rendered by the circuit court of the United States within & for the northern district of Ohio, at the October term thereof, A. D. 1874, in favor of the said John Wood, assignee, and against the said Stephen L. Newcomb, whereby a judgment of the district court of the United States within & for said northern district of Ohio, rendered at the January term thereof, A. D. 1874, in favor of said John Wood, assignee, and against the said Stephen L. Newcomb, for the sum of six thousand three hundred and fifty-six dollars and ninety cents, damages, and six hundred and eighty-nine dollars and fifteen cents, costs of suit, was affirmed by the said circuit court, with costs, upon a writ of error of said circuit court, sued out in that behalf by the said Stephen L. Newcomb against the
8 said John Wood, assignee, which costs in said circuit court were taxed to the sum of forty-four dollars and fifty cents: Now, therefore, if the said Stephen L. Newcomb shall prosecute his said writ of error in said Supreme Court to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; otherwise to remain in full force in law.

STEPHEN L. NEWCOMB. [SEAL.]
JOSEPH GUNSAULERS. [SEAL.]
EDMUND WRIGHT. [SEAL.]

NORTHERN DISTRICT OF OHIO, *ss:*

It is hereby certified that the foregoing is a true copy of a certain bond in error now remaining of file in the circuit court of the United States within & for the district aforesaid.

Witness my official signature & the seal of said court, at Cleveland, in said district, this 7th day of August, A. D. 1875.

[SEAL.]

EARL BILL,
Clerk of said Cir. Court,
By CHA'S H. BILL,
Deputy Clerk.

(Indorsed :) Stephen L. Newcomb v. John Wood, assignee. Bond in error. Filed Jan'y 9th, 1875, and approved. M. Welker, judge U. S. circuit court, N. D. of Ohio.

9 October term, A. D. 1874.

At a stated term of the circuit court of the United States, within and for the northern district of Ohio, begun and held at Cleveland, in said district, on the first Tuesday of October, being the sixth day of that month, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States of America the ninety-ninth.

Present, the honorable Halmor H. Emmons, circuit judge, and the honorable Martin Welker, district judge.

Among the proceedings then and there had, were the following, to wit:

STEPHEN L. NEWCOMB *vs.* JOHN WOOD, ASSIGNEE IN BANKRUPTCY OF Philip E. Robertson.	2557. Error to district court.

Be it remembered that heretofore, to wit, on the 5th day of March, A. D. 1874, came the plaintiff in error, and filed in the clerk's office of said court his petition in error, which is in the words and figures following, to wit:

Petition in error.

United States circuit court, northern district of Ohio.

STEPHEN L. NEWCOMB, PLAINTIFF, *vs.* JOHN WOOD, ASSIGNEE IN BANKRUPTCY OF Philip E. Robertson, defendant.	Petition in error.

The said Stephen L. Newcomb, plaintiff, complains of the said John Wood, assignee in bankruptcy of Philip E. Robertson, defendant, for that the said defendant, at the January term of the district 10 court of the United States for the northern district of Ohio, A. D. 1874, to wit, on the 21st day of January, A. D. 1874, recovered a judgment, by the consideration of said court, against the said plaintiff, in a certain action then pending in said court, wherein the said John Wood, assignee of Philip E. Robertson, was plaintiff, and said Stephen L. Newcomb was defendant, a copy of the record of the judgment and proceedings in which case, duly certified, is hereto attached and marked "A," and made a part of this petition.

And the said Stephen L. Newcomb avers that there is error in the said record and proceedings, in this, to wit:

First. That the said court had no jurisdiction to, and erred in appointing referees in said cause, and before whom the same was tried.

Second. The court erred in overruling the exceptions to the report of said referees, filed by said Stephen L. Newcomb thereto.

Third. That said court erred in sustaining and rendering judgment upon the said report of referees, and in refusing to set the same aside.

Fourth. The said court erred in refusing to grant a new trial of said action.

Fifth. That the court erred in refusing to grant a second trial of said action.

Sixth. That the court erred in refusing to grant an appeal of said cause to the circuit court of the United States.

The said Stephen L. Newcomb therefore prays that the said judgment may be reversed, and that the said plaintiff may be restored to all things he has lost by reason thereof.

OLDS & DICKEY,
Att'ys for Plaintiff in Error.

11 And afterwards, to wit, on the 19th day of March, A. D. 1874, the said plaintiff in error sued out of the circuit court aforesaid a certain writ of error, which is in the words and figures following, to wit:

Writ of error.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

The President of the United States of America to the judge of the district court of the United States for the northern district of Ohio, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said district court before you, between John Wood, assignee in bankruptcy of Philip E. Robertson, plaintiff, and Stephen L. Newcomb, defendant, a manifest errror hath happened, to the great damage of the said Stephen L. Newcomb, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the circuit court of the United States for the sixth circuit and northern district of Ohio, together with this writ, so that you have the same at Cleveland, in the said district, on the 22nd day of April next, in the said circuit court to be then and there held, that, the record and proceedings aforesaid being inspected, the said circuit court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

12 Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 19th day of March, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States of America the ninety-eighth.

[SEAL.]

EARL BILL,
Clerk of said Circuit Court.

And also, on said 19th day of March, A. D. 1874, there was duly issued out of said circuit court a certain citation, which is in the words and figures following, to wit:

Citation.

THE UNITED STATES OF AMERICA,
Northern District of Ohio :

To John Wood, assignee in bankruptcy of Philip E. Robertson, greeting:

You are hereby cited and admonished to be and appear at a circuit court of the United States, to be held at Cleveland, in and for said northern district of Ohio, on the 22nd day of April next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the said northern district of Ohio, wherein Stephen L. Newcomb is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 19th day of March, in *in* the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] M. WELKER,
District Judge, and one of the Judges of s'd Circuit Court.

And afterwards, to wit, on the 25th day of March, A. D. 1874, said citation was returned and filed in the clerk's office of said circuit court, endorsed as follows, to wit:

Return of citation.

NORTHERN DISTRICT OF OHIO, *ss :*

13 On the 21st day of March, A. D. 1874, I delivered a true copy of the within writ, duly certified, to the within named John Wood, assignee of Philip E. Robertson, at Mansfield, Richland County, Ohio.

N. B. PRENTICE,
U. S. Marshal,
By W'M M. HAHN, *Deputy.*

And also, on said 25th day of March, A. D. 1874, said writ of error was duly returned to said circuit court, and filed in the clerk's office thereof, endorsed as follows, to wit:

Return of writ of error.

NORTHERN DISTRICT OF OHIO, *ss :*

The execution of the within writ will appear by the certified transcript of the proceedings in the said district court, in the cause therein named, returned to said circuit court herewith.

EARL BILL,
Clerk U. S. District Court.

March 19th, 1874.

Said certified transcript of the proceedings in said district court is as follows, to wit:

Transcript from dist. court.

January term, A. D. 1874.

At a stated term of the district court of the United States, within and for the northern district of Ohio, begun and held at Cleveland in said district on the first Tuesday of January, being the sixth day of that month, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States of America, the ninety-eighth.

Present his honor Martin Welker, district judge.

Among the proceedings then and there had were the following, to wit:

JOHN WOOD, ASSIGNEE IN BANKRUPTCY OF
Philip E. Robertson, plaintiff,
v.
STEPHEN L NEWCOMB, DEFENDANT.
} Money only.

Be it remembered that heretofore, to wit, on the first day November, A. D. 1872, came the plaintiff, by his attorneys, and filed in the clerk's office of said district court his petition and precipe, which are
14 respectively in the words and figures following, to wit:

Petition.

In the district court of the United States for the northern district of Ohio.

JOHN WOOD, ASSIGNEE IN BANKRUPTCY OF
Philip E. Robertson, plaintiff,
vs.
STEPHEN L. NEWCOMB, DEFENDANT.
} Petition.

The said plaintiff, John Wood, represents that on or about the 29th day of May, A. D. 1872, one Philip E. Robertson, late of the village of Sparta, county of Morrow, in the State of Ohio, within said district, was by the order and decree of this court, and upon creditors' petition, duly adjudicated a bankrupt within the meaning & intent of the Act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, and that in said matter such other and further proceedings were thereafter had that on the 28th day of June, A. D. 1872, this plaintiff was regularly and duly elected assignee in bankruptcy of said Philip E. Robertson, and that he, this plaintiff, is now the duly elected and qualified and acting assignee in bankruptcy of said Philip E. Robertson.

And the said plaintiff, John Wood, as such assignee in bankruptcy of said Philip E. Robertson, complains of the said defendant, Stephen L. Newcomb, and says that on or about the 6th day of May, A. D. 1872, the said Philip E. Robertson was a merchant and trader in the village of Sparta, in the county of Morrow, in the State of Ohio, within said district, and as such was the owner and in possession of a large stock of dry goods, groceries, queen's-ware, hats, caps, and general sundries
15 and notions, being the stock in trade of said Robertson in his business aforesaid.

The plaintiff says he cannot give any more particular or specific description of said stock of goods & merchandise, or of the articles composing the same, for the reason that said stock has never been in affiant's possession or custody, neither has he been able to obtain from said bankrupt or from said defendant any invoice or inventory thereof; but the plaintiff says he has good reason to believe, and does believe, and he therefore charges the fact to be, that said stock of goods & merchandise, on said 6th day of May, 1872, and at the time of the committing by said bankrupt and said defendant of the fraudulent and wrongful acts hereinafter recited, was worth at least the sum of eight thousand dollars.

The plaintiff further says that on said 6th day of May, A. D. 1872, and within four months before the filing of said petition for adjudication against said Philip E. Robertson at said village of Sparta, the said Philip E. Robertson, being then and there insolvent and in contemplation of insolvency, and with a view to give a preference to said defendant, Stephen L. Newcomb, who was then & there a creditor of and had a claim against said Philip E. Robertson, fraudulently and wrongfully made to the said Stephen L. Newcomb a payment, pledge, assignment, transfer, and conveyance of the whole & entire stock of goods & merchandise, and that he, said defendant, Stephen L. Newcomb, as such creditor, then and there received and procured from said bankrupt, fraudulently, wrongfully, and with a view to unlawfully obtain a preference, a payment, pledge, assignment, transfer, and conveyance of said stock
16 of goods and merchandise, and further that he, said defendant, Stephen L. Newcomb, had then and there reasonable cause to believe, and did believe and know said bankrupt, Philip E. Robertson, to be then and there insolvent and in contemplation of insolvency, and that such payment, pledge, assignment, transfer, and conveyance was made in fraud of the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

The premises considered, the plaintiff says that said payment, pledge, assignment, transfer, and conveyance, so as aforesaid fraudulently made by said bankrupt, and so as aforesaid fraudulently procured and received by said defendant, is void, and that a cause of action has accrued to the plaintiff, as assignee as aforesaid, against said defendant

The plaintiff says that he has since his said election and qualification as such assignee demanded from said defendant the said property and stock of goods and merchandise, but that said defendant has failed and refused, and still fails and refuses, to deliver to the plaintiff said property, stock of goods, and merchandise, or any part thereof, and has failed and refused, and still fails & refuses, to account for, either in whole or in part, the value of said property, although by the plaintiff often requested so to do.

The plaintiff therefore prays judgment against said defendant, Stephen L. Newcomb, for said amount of eight thousand dollars, the aforesaid value of said property, the stock of goods & merchandise so as aforesaid
17 fraudulently and wrongfully by said defendant received from said bankrupt, Philip E. Robertson.

JOHN WOOD, *Assignee, &c.*,
By COOPER, PORTER & MITCHELL,
His Att'ys.

UNITED STATES OF AMERICA,
Northern District of Ohio :

John Wood, the plaintiff aforesaid, being sworn says, that the statements contained in the foregoing petition are true so far as the same are stated of his own knowledge, and that those matters which are stated therein on information and belief are true according to the best of his knowledge, information, and belief.

JOHN WOOD.

Subscribed & sworn to before me this 30th day of October, 1872.

HENRY C. HEDGES,
Register in Bankruptcy.

Precipe.

In the U. S. district court for the northern district of Ohio.

JOHN WOOD, ASSIGNEE, &C.,
vs.
STEPHEN L. NEWCOMB.

To the clerk of said court:

Issue to the marshal of said district a summons for the defendant, Stephen L. Newcomb, on the foregoing petition, returnable according to law, action to recover value of property fraudulently, and as an illegal preference by the defendant received from the bankrupt, Philip E. Robertson.

Amount claimed, $8,000.

COOPER, PORTER & MITCHELL,
Attorneys for Assignee.

And thereupon the following summons was duly issued herein by the clerk of said court, which is in the words and figures following, to wit:

Summons.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

The President of the United States of America to the marshal of the northern district of Ohio, greeting:

You are hereby commanded to notify Stephen L. Newcomb that he has been sued by John Wood, assignee in bankruptcy of Philip E. Robertson, in the district court of the United States within and for
18 the said district, and that unless he answers by the 30th day of
November, A. D. 1872, the petition of the said plaintiff against him, filed in the clerk's office of said court, at Cleveland, in said district, such petition will be taken as true, and judgment will be rendered accordingly.

You will make due return of this summons on the 11th day of November, A. D. 1872.

Witness the honorable Charles T. Sherman, judge of the said district court of the United States, this 1st day of November, A. D. 1872, and in the 97th year of the Independence of the United States of America.

[SEAL.] EARL BILL, *Clerk,*
By CHAS. H. BILL, *Deputy Clerk.*

End'st on summons.

Said summons was endorsed, "Amount claimed on cause of action No. 1, for which, with interest from the 1st day of November, 1872, judgment will be taken if you fail to answer, $8,000."

And afterward, to wit, on the 11th day of November, A. D. 1872, said summons was duly returned to said clerk's office, by said marshal, with his proceedings thereon, endorsed in the words and figures following, to wit:

Return.

NORTHERN DISTRICT OF OHIO, *ss;*

On the 8th day of November, A. D. 1872, I made due service of this writ by delivering a true and certified copy thereof to the within-named Stephen L. Newcomb, at Sparta, Morrow county, Ohio.

N. B. PRENTICE,
U. S. Marshal,
By JOHN ODELL, *Deputy.*

And afterward, to wit, on the 26th day of November, A. D. 1872, came the said defendant, by his attorneys, and filed herein his answer, which is in the words and figures following, to wit:

Answer.

In the district court of the United States of America for the northern district of Ohio.

19 JOHN WOOD, ASSIGNEE IN BANKRUPTCY OF Philip E. Robertson, plaintiff,
vs.
STEPHEN L. NEWCOMB, DEFENDANT.
} Answer.

And now comes the said Stephen L. Newcomb, defendant, and for answer to the petition of the plaintiff, herein filed, says that he denies the allegation, in said petition contained that the said stock of goods, wares, merchandise, &c., of the said Philip E. Robertson was of the value of $8,000.

Also denies the allegation, in said petition contained, that he the said Stephen L. Newcomb, as such creditor, then and there, as such creditor, received and procured from said bankrupt, fraudulently, wrongfully, and with a view to unlawfully obtain a preference, or payment, pledge, assignment, transfer, and conveyance of said stock of goods & merchandise.

Also denies the allegation, in said petition contained, that said Stephen L. Newcomb then and there had reasonable cause to believe, and did believe and know said bankrupt, Philip E. Robertson, to be then and there insolvent, and in contemplation of insolvency, and that such payment, pledge, assignment, transfer, and conveyance, was made in fraud of the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867.

Also denies the allegation, in said petition contained, that said pledge, payment, assignment, transfer, and conveyance was fraudulently received and procured by said defendant, Stephen L. Newcomb, and is void, and that a cause of action has accrued to the plaintiff, as assignee, against this defendant.

20 Defendant also denies that any demand of said property has ever been made upon him by said assignee, or by any other person for him, or of any part thereof, and defendant denies all fraud or combination with which he stands charged in the petition.

And defendant, in further answering, says, that on or about the 7th day of May, 1872, he purchased from the said Philip E. Robertson, in the regular course of business, a stock of goods and merchandise that he, the said Philip E. Robertson, was then and there the owner of, in the village of Sparta, in Morrow County, Ohio, for the sum of two thousand seven hundred dollars, which was a full and fair price for the same.

That at the time of making said purchase he had no knowledge whatever, nor even suspicion, that said Philip E. Robertson was insolvent, or that he contemplated insolvency; that he never had an intimation of the kind, and that he had no reason to know or to believe that he was insolvent, or in failing circumstances, or that he was not fully able to pay all his debts; that he had no reason to believe that he contemplated insolvency, or to avoid the act of Congress known as the bankrupt act, or any fraud or wrong whatever, and that he paid the said Philip E. Robertson in full for said goods, wares, merchandise, &c., five hundred dollars of which was in cash, and that he fully and firmly believed the said Philip E. Robertson to be entirely solvent, and fully able to pay his debts, and did not know, or have any reason to believe, that said Robertson would not or did not intend to pay all his debts, and
21 says that he then supposed, and was so informed by the said Robertson, that his only object in making such sale was for the purpose of engaging in other business.

He also says that at that time said Robertson had, that was not purchased by this defendant, a large amount of outstanding claims due to him for goods sold by him in his said business that were good and available, and had real estate and other property belonging to him; and defendant says that he does not know that said Robertson is insolvent.

He also says that in making said purchase he acted in the utmost good faith, and he hereby denies each and every allegation in said petition contained contrary thereto, and asks to be hence dismissed with his costs.

STEPHEN L. NEWCOMB,
By JA'S OLDS, *His Attorney.*

UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

Stephen L. Newcomb, defendant aforesaid, being duly sworn, says that all the statements, and allegations, and matters, and facts in the foregoing answer contained are true, as he verily believes.

S. L. NEWCOMB.

Subscribed and sworn to before me this 26th day of November, A. D 1872.

CHA'S H. BILL,
Dep. U. S. Clerk.

And afterwards, to wit, on the 4th day of December, A. D. 1872, came the said plaintiff, by his attorneys, and filed herein his reply, which is in the words and figures following, to wit:

Reply.

In the district court of the United States for the northern district of Ohio.

JOHN WOOD, ASSIGNEE IN BANKRUPTCY OF
Philip E. Robertson, plaintiff,
vs.
STEPHEN L. NEWCOMB, DEFENDANT.
} Reply.

22 The said plaintiff now comes, and replying to the defendant's answer says as to the allegations therein made that the defendant

Return.

NORTHERN DISTRICT OF OHIO, *ss;*

On the 8th day of November, A. D. 1872, I made due service of this writ by delivering a true and certified copy thereof to the within-named Stephen L. Newcomb, at Sparta, Morrow county, Ohio.

N. B. PRENTICE,
U. S. Marshal,
By JOHN ODELL, *Deputy.*

And afterward, to wit, on the 26th day of November, A. D. 1872, came the said defendant, by his attorneys, and filed herein his answer, which is in the words and figures following, to wit:

Answer.

In the district court of the United States of America for the northern district of Ohio.

19 JOHN WOOD, ASSIGNEE IN BANKRUPTCY OF
Philip E. Robertson, plaintiff,
vs.
STEPHEN L. NEWCOMB, DEFENDANT. } Answer.

And now comes the said Stephen L. Newcomb, defendant, and for answer to the petition of the plaintiff, herein filed, says that he denies the allegation, in said petition contained that the said stock of goods, wares, merchandise, &c., of the said Philip E. Robertson was of the value of $8,000.

Also denies the allegation, in said petition contained, that he the said Stephen L. Newcomb, as such creditor, then and there, as such creditor, received and procured from said bankrupt, fraudulently, wrongfully, and with a view to unlawfully obtain a preference, or payment, pledge, assignment, transfer, and conveyance of said stock of goods & merchandise.

Also denies the allegation, in said petition contained, that said Stephen L. Newcomb then and there had reasonable cause to believe, and did believe and know said bankrupt, Philip E. Robertson, to be then and there insolvent, and in contemplation of insolvency, and that such payment, pledge, assignment, transfer, and conveyance, was made in fraud of the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867.

Also denies the allegation, in said petition contained, that said pledge, payment, assignment, transfer, and conveyance was fraudulently received and procured by said defendant, Stephen L. Newcomb, and is void, and that a cause of action has accrued to the plaintiff, as assignee, against this defendant.

20 Defendant also denies that any demand of said property has ever been made upon him by said assignee, or by any other person for him, or of any part thereof, and defendant denies all fraud or combination with which he stands charged in the petition.

And defendant, in further answering, says, that on or about the 7th day of May, 1872, he purchased from the said Philip E. Robertson, in the regular course of business, a stock of goods and merchandise that he, the said Philip E. Robertson, was then and there the owner of, in the village of Sparta, in Morrow County, Ohio, for the sum of two thousand seven hundred dollars, which was a full and fair price for the same.

That at the time of making said purchase he had no knowledge whatever, nor even suspicion, that said Philip E. Robertson was insolvent, or that he contemplated insolvency; that he never had an intimation of the kind, and that he had no reason to know or to believe that he was insolvent, or in failing circumstances, or that he was not fully able to pay all his debts; that he had no reason to believe that he contemplated insolvency, or to avoid the act of Congress known as the bankrupt act, or any fraud or wrong whatever, and that he paid the said Philip E. Robertson in full for said goods, wares, merchandise, &c., five hundred dollars of which was in cash, and that he fully and firmly believed the said Philip E. Robertson to be entirely solvent, and fully able to pay his debts, and did not know, or have any reason to believe, that said Robertson would not or did not intend to pay all his debts, and
21 says that he then supposed, and was so informed by the said Robertson, that his only object in making such sale was for the purpose of engaging in other business.

He also says that at that time said Robertson had, that was not purchased by this defendant, a large amount of outstanding claims due to him for goods sold by him in his said business that were good and available, and had real estate and other property belonging to him; and defendant says that he does not know that said Robertson is insolvent.

He also says that in making said purchase he acted in the utmost good faith, and he hereby denies each and every allegation in said petition contained contrary thereto, and asks to be hence dismissed with his costs.

STEPHEN L. NEWCOMB,
By JA'S OLDS, *His Attorney*.

UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

Stephen L. Newcomb, defendant aforesaid, being duly sworn, says that all the statements, and allegations, and matters, and facts in the foregoing answer contained are true, as he verily believes.

S. L. NEWCOMB.

Subscribed and sworn to before me this 26th day of November, A. D 1872.

CHA'S H. BILL,
Dep. U. S. Clerk.

And afterwards, to wit, on the 4th day of December, A. D. 1872, came the said plaintiff, by his attorneys, and filed herein his reply, which is in the words and figures following, to wit:

Reply.

In the district court of the United States for the northern district of Ohio.

JOHN WOOD, ASSIGNEE IN BANKRUPTCY OF Philip E. Robertson, plaintiff,
vs.
STEPHEN L. NEWCOMB, DEFENDANT.
} Reply.

The said plaintiff now comes, and replying to the defendant's
22 answer says as to the allegations therein made that the defendant

paid to said bankrupt as the price and consideration of the stock of goods and merchandise described in the petition the amount of twenty-seven hundred dollars, of which five hundred dollars was cash, and that at the time said defendant took said stock from said bankrupt said bankrupt was the owner of real estate in said village of Sparta, and was the owner of a large amount of good, available, and outstanding accounts, as well as other property, that this plaintiff has no knowledge further than that he has never been able to discover any such property as assets of the estate of said bankrupt. Wherefore, and for the purposes of this reply, the plaintiff denies said allegations of said answer.

And the plaintiff, further replying, says that he denies each and every other allegation of said defendant's answer, excepting the allegation that said defendant took from said bankrupt said stock of goods and merchandise mentioned in the petition.

COOPER, PORTER & MITCHELL,
Attorneys for the Plaintiff.

UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

John Wood, assignee in bankruptcy of Philip E. Robertson, being sworn, says he believes the statements and allegations of the foregoing reply to be true.

JOHN WOOD.

Subscribed and sworn to before me this 13th day of December, 1872.

HENRY C. HEDGES,
Register in Bankruptcy.

Order of reference.

And afterwards, to wit, at the October term of said court, to wit, on the 18th day of November, A. D. 1873, came the parties, by Cooper, 23 Porter & Mitchell, attorneys for said plaintiff, and James Olds, attorney for said defendant; and by full and due consent of said parties this cause is referred to the following referees, to wit: Henry C. Hedges, of Mansfield, Richland County, Ohio; Joseph C. Devin, of M't Vernon, Knox County, Ohio; A. K. Dunn, of M't Gilead, Morrow County, Ohio.

And the said referees are hereby fully authorized and empowered to fully hear and determine all questions both of law and of fact in issue and pending between the parties in the action aforesaid, with full and due authority as of this court to said referees or to any one of them to send for, issue process for, and compel the attendance of witnesses, and the giving of testimony thereby before said referees.

It is by the court here ordered that said referees meet at the office of J. C. Devin, esq., at the city of M't Vernon, Knox County, Ohio, on the 22d day of December, A. D. 1873, at 9 o'clock a. m., and that they continue said hearing from day to day, until with all practicable dispatch they shall have heard and determined the issues of law and fact pending between said parties in said case.

And it is further ordered that said referees return fully their finding and report in the premises into this court before the next term thereof, to which time this cause is continued, and that the clerk of this court shall forthwith forward all pleadings, papers, depositions, and orders in this action filed and made to J. C. Devin, M't Vernon, Ohio.

And afterwards, to wit, on the 10th day of January, A. D. 1874, the following report of referees was duly filed herein, which is in the
24 words and figures following, to wit:

Report.

In the district court of the United States for the northern district of Ohio.

In the matter of Philip E. Robertson, bankrupt. In bankruptcy.

JOHN WOOD, ASSIGNEE IN BANKRUPTCY OF Philip E. Robertson, bankrupt,
vs.
STEPHEN L. NEWCOMB.
} Civil action.

Order of reference to A. K. Dunn, J. C. Devin, and Henry C. Hedges, with authority to meet at M't Vernon, Ohio, on December 22d, 1873, at office of J. C. Devin, esq., and continue from day to day until determined.

NORTHERN DISTRICT OF OHIO, *ss:*

At Mount Vernon, in said district, at office of J. C. Devin, esq., on the 22d day of December, A. D. 1873, the said A. K. Dunn, Jos. C. Devin, & Henry C. Hedges, in pursuance of the order of the district court of the United States for the northern district of Ohio, met at the abovenamed place and time.

Present, the plaintiff by his counsel, Mess. Cooper, Porter & Mitchell; and the defendant in person and by his counsel, Mess. Olds & Dickey.

Thereupon a hearing was had. The plaintiff produced and had sworn and examined sundry witnesses and depositions of witnesses; thereupon the defendant had sworn and examined sundry witnesses; and after hearing all the testimony of the parties the referees took a recess until the 7th day of January, 1874, and again met on January 7, 1874.

The counsel having filed with us written arguments we thereupon proceeded to consider all the testimony offered, and having heard the arguments of counsel, and after mature deliberation, do find—

First. That on the 29th day of May, A. D. 1872, Philip E.
25 Robertson was by the order of the district court duly adjudicated a bankrupt upon creditors' petition within the meaning and intent of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

2d. That on the 6th day of May, A. D. 1872, and prior thereto, said Philip E. Robertson was a merchant and trader in the village of Sparta, Morrow County, Ohio, carrying on a retail business; that on the 7th day of May, A. D. 1872, said defendant purchased the entire stock of said Robertson with the exception of some hardware then in the store, but before that time sold, and some ribbons before that time sold, some flour on commission, and some few goods retained by said Robertson for his own and family use, in a lump, without invoice or inventory, for the sum of $2,650, paying therefor with notes held by said Newcomb against said Robertson, amounting to $2,150, and giving him in currency $500.

We find that said sale was not in the usual and ordinary course of business of said Robertson; that said Robertson made said sale in contemplation of insolvency; that said Newcomb, was the time of said at sale a creditor of said Robertson to the extent of $2,150, and that said defendant had reasonable cause to believe and know that said Robertson was then and there in contemplation of insolvency by making said sale to said defendant.

3d. We find that the value of the stock of merchandise so sold to said defendant by said Robertson on said seventh day of May, A. D.
26 1872, was five thousand seven hundred and seventy-nine dollars, and that said defendant should account to the plaintiff for said sum, with interest thereon from May 7, 1872, which interest to this day, January 7th, 1874, would be the sum of five hundred and seventy-seven dollars and ninety cents; and together, the sum of six thousand and three hundred and fifty-six dollars and ninety cents, on this 7th day of January, 1874.

We append herewith a statement of the witness fees & mileage, and a statement of taxed costs by the dept marshal.

We have each expended in going to & from M't Vernon & hotel bills, having met at Mansfield to make up cost-bill, as follows:

A. K. Dunn, actual expenditures	$18 55
Jos. C. Devin, do. do.	$ 8 80
H. C. Hedges, do. do.	$ 6 80
	$34 15

The referees worked almost day and night in hearing the testimony, and have really worked five days and three nights, and submit that they be compensated by an allowance of actual expenditures as above stated, and a further allowance of $75 each, or such compensation as the court approves.

JOSEPH C. DEVIN,
HENRY C. HEDGES,
Referees.

And afterwards, to wit, on the 12th day of January, A. D. 1874, the following exceptions to the foregoing report were duly filed herein, which are in the words and figures following, to wit:

Exceptions to report.

JOHN WOOD, AS ASSIGNEE OF PHILIP E. ROBERTSON, plaintiff,
against
STEPHEN L. NEWCOMB, DEFENDANT.

In the district court of the United States for the northern district of Ohio.

Exceptions to report of referees.

27 The said Stephen L. Newcomb here excepts to the report of the referees in the above-entitled action, and to the entering of a judgment thereon in said court, for the following reasons, to wit:

First. For the reason that said referees were not, nor were either of them, sworn or affirmed well and faithfully to hear and examine the cause, and to make a just and true report therein, according to the best of their understanding, as is required by law.

OLDS & DICKEY,
Attorneys for Defendant.

And afterwards, to wit, on the 21st day of January, A. D. 1874, the following agreed statement of facts was filed herein in said clerk's office, which is in the words and figures following, to wit:

Agreed statement of facts.

JOHN WOOD, AS ASSIGNEE OF PHILIP E. ROBERTSON, plaintiff,
vs.
STEPHEN L. NEWCOMB, DEFENDANT.

United States district court for northern district of Ohio.

It is agreed by said parties that as matter of fact the referees before whom the above-entitled action was tried, and who made their report thereon, were not as such referees sworn or affirmed to perform their duties as such referees in the trial of said action.

It is further agreed that prior to the trial of said action a conversation was had between James Olds, attorney for defendant, and J. C. Devin, one of said referees, about the necessity of said referees being sworn as such to try said action, but in which conversation M'r Olds did not in any way express an opinion that said referees should not be sworn, and did not at any time expressly waive any of the requirements of
28 law with reference to the swearing of the same; that upon the trial of said action nothing was said by either party about the swearing of said referees.

COOPER, PORTER & MITCHELL,
Att'ys for Pl'ff.
OLDS & DICKEY, *Att'ys for Def't.*

JANUARY 14TH, 1874.

Hearing on ex. to report.

And afterwards, to wit, at the January term, A. D. 1874, of said court, to wit, on the 21st day of January, A. D. 1874, this cause came on to be heard upon the exceptions filed by the defendant, Stephen L. Newcomb, to the report made and filed in this cause by the referees heretofore appointed under a former order of this court, made by consent of parties.

Ex. overruled & ex. by def't.

And said exceptions having been presented to the court, and the court having examined the same and heard the arguments of counsel, and being fully advised in the premises, do overrule said exceptions, to which ruling of the court defendant, by his counsel, excepts.

And thereupon this cause came on for further hearing, upon the motion of the said plaintiff for a judgment upon the said report of the said referees, and the facts and findings by them reported to this court in writing, under the said former order of the court.

Report affirmed.

And the court having examined the said report, and heard the arguments of counsel, and being fully advised in the premises, find that said report is in all things correct, regular, and legal, and that said report should be, and the same is, hereby affirmed by the court.

And the court find that the allegations made and contained in the petition and reply of the plaintiff are true, as shown by said report, and that the allegations made in the answer of the defendant, which
29 are inconsistent with said petition and reply, are untrue, and that
there is due to the said plaintiff, as assignee as aforesaid, from the defendant, by reason of the premises, the sum of six thousand three hundred and fifty-six dollars and ninety cents ($6,356.90), as found by said referees in their report aforesaid.

Judg't.

It is therefore by the court considered, adjudged, and decreed, that the said plaintiff, John Wood, assignee of Philip E. Robertson, a bankrupt, recover of the defendant, the said Stephen L. Newcomb, the said sum of six thousand three hundred and fifty-six dollars and ninety cents, and his costs in this behalf expended, including his costs before said referees taxed at $250.29, and an allowance of $75 each to said referees; and also for actual expenses as follows: to A. K. Dunn, $18.55; J. C. Devin, $8.80; and to H. C. Hedges, $6.80, as asked for in their report, and allowance of $10.00 to J. C. Devin for use of office and stationery, and that said defendant pay his own cost, including that made by him on the hearing before said referees, taxed at $169.71.

Ex. by def't.

To which ruling, judgment, and decree the defendant, by his counsel, excepts.

Mo. for 2d trial overruled. Ex. by def't.

And thereupon came the said defendant, by his counsel, and moved the court for a second trial in this case in this court.

Appeal disallowed & ex. by def't.

Which the court upon consideration refused to allow, to which ruling and opinion of the court the defendant excepted.

And thereupon the defendant gave notice of his intention to appeal this cause to the circuit court of the United States, and applied to the court to fix the penalty of the bond for such appeal.

Whereupon the court being of the opinion that this cause can-
30 not lawfully be so appealed, doth refuse the said application, to
which opinion and ruling of the court the said defendant excepts.

Clerk's certificate.

NORTHERN DISTRICT OF OHIO, *ss:*

It is hereby certified that the foregoing is truly taken and copied from the record and proceedings of the district court of the United States within and for the district aforesaid.

Witness my official signature and the seal of said court at Cleveland, in said district, this 4th day of February, A. D. 1874.

[SEAL.] EARL BILL, *Clerk*,
By CHA'S H. BILL, *Deputy Clerk.*

And also, on said 25th day of March, A. D. 1874, there was filed herein, in said clerk's office of said circuit court, a certain undertaking in error, which is in the words and figures following, to wit:

Undertaking in error.

In the circuit court of the United States for the northern district of Ohio.

Whereas Stephen L. Newcomb has this 6th day of March, A. D. 1874, filed in the clerk's office of the circuit court of the United States, within and for the northern district of Ohio, his petition in error, against John Wood, assignee in bankruptcy of Philip E. Robertson, to obtain the reversal of a judgment rendered in the district court of the United States, within and for the district aforesaid, at its January term, 1874, in an action wherein the said John Wood, assignee as aforesaid, was plaintiff, and the said Stephen L. Newcomb, was defendant, and in which action the said John Wood, as such assignee, recovered a judgment against the said Stephen L. Newcomb for $6,356.90 debt and $519.44 plaintiff's costs of suit:

Now, therefore, we, Stephen L. Newcomb, Edmund Wright, &
31 Joseph Gunsaulers, do undertake to the said John Wood, assignee, as aforesaid, in the sum of thirteen thousand seven hundred and fifty-two dollars and sixty-eight cents ($13,752.68), that the said Stephen L. Newcomb will pay the condemnation money and costs in case the said judgment shall be affirmed in whole or in part.

STEPHEN L. NEWCOMB.
JOSEPH GUNSAULERS.
EDMUND WRIGHT.

Said undertaking was endorsed as follows, to wit:

THE STATE OF OHIO,
Morrow County, *ss:*

It is hereby certified that Joseph Gunsaulers and Edmund Wright, sureties on the within bond, are good and sufficient sureties for the amount of said bond; that they reside in Morrow County, Ohio, and that their signatures thereto are genuine.

Attest my hand and the seal of Morrow Co., Ohio, court of com. pleas, at M't Gilead, O., M'ch 7, 1874.

[SEAL.] R. F. BARTLETT, *Clerk.*

Approval of undertaking.

Said bond was also endorsed: "The within error bond approved M'ch 19, '74. M. Welker, judge."

And afterward, to wit, at the April term of said court, to wit, on the 16th day of September, A. D. 1874, this cause is continued until the next term of this court.

Leave to amend assig't.

And afterward, to wit, at the October term of said court, to wit, on the 15th day of December, A. D. 1874, on motion to the court by Estep & Burke, attorneys for the said plaintiff in error, leave is granted to said plaintiff in error to amend his assignment of error herein instanter.

Hearing.

32 And afterward, to wit, at said October term of said court, to wit, on the 16th day of December, A. D. 1874, came the parties, by their attorneys, and thereupon this cause came on to be heard as well upon the transcript of the judgments and other proceedings between said parties in the district court of the United States within and for said northern district of Ohio, and the original files and pleadings brought here by writ of error from this court to the said district court, and also upon the matters by the said Stephen L. Newcomb assigned for error, and the same being seen, and by the court here now fully understood, and mature deliberation being thereupon had, it appears to the court here that there is no error either in the record & proceedings aforesaid, or in giving the judgement aforesaid.

Judg't of dist. court affirmed.

Therefore it is considered that the judgment aforesaid, in form aforesaid given, be in all things affirmed and stand in full force and effect.

And it is further considered that the said John Wood, assignee as aforesaid, do recover against the said Stephen L. Newcomb his costs in this behalf expended, taxed to $44.50.

And it is ordered that a special mandate be sent down to said district court to carry this judgment into execution.

33 NORTHERN DISTRICT OF OHIO, *ss:*

It is hereby certified that the foregoing is truly taken and copied from the record and proceedings of the circuit court of the United States within and for the northern district of Ohio aforesaid.

Witness my official signature and the seal of said court, at Cleveland, in said district, this 7th day of August, A. D. 1875.

[SEAL.]

EARL BILL,
Clerk of s'd Cir. Court,
By CHA'S H. BILL,
Deputy Clerk.

Fees of clerk of circuit court.

Issuing writ of error	1 00
Making return thereon	30
Copy to files of circuit court	50
Issuing citation	1 00
Drawing bond & filing same	1 00
Copy of same, & c't'f' & seal	85
Making transcript, 124 fol	12 40
Certificate & seal	35
	$17 40

Rec'd of E. J. Estep, esq., att'y for pl'ff in error, $17.40, the above costs.

Sept. 4, 1875.

EARL BILL, *Clerk.*

(Indorsement on cover:) No. 333. Stephen L. Newcomb, plaintiff in error, vs. John Wood, assignee of Philip E. Robertson, a bankrupt. N. Ohio C. C. U. S. Filed 24th December, 1875.

SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

STEPHEN L. NEWCOMB,
Plaintiff,
VS.
JOHN WOOD,** Assignee in Bankruptcy of **Philip E. Robertson,
Defendant.

IN ERROR TO CIRCUIT COURT OF THE UNITED
STATES FOR THE NORTHERN
DISTRICT OF OHIO

ARGUMENT OF PLAINTIFF IN ERROR,

BY

OLDS & DICKEY.

ARGUMENT.

—:o:—

I. Referees sat as a court, not as a jury.
II. Report signed by only two referees.
III. Referees must be sworn as such.

Referees sat as a Court, not as a Jury

We claim, on behalf of this plaintiff in Error, that the referees, appointed by the Court in this action, sat not as Jurors, to determine upon the facts alone, but in the capacity of a court, to whom a cause is submitted, to determine all questions, both of law and fact; and that they sat clothed with all the power of a Court, except the power to render judgment and issue execution. Had the referees, appointed by the Court, been empowered to report only upon the facts found by them in the case, their report would have stood as the special verdict of a jury. But in this case, as will be seen by reference to page 20 of the Record, the referees were "fully authorized and empowered to *fully hear and determine all questions, both of law and fact, in issue* and pending between the parties aforesaid, with full and due authority as of this Court to said referees or to any one of them, to send for, issue process, and compel the attendance of witnesses, and the giving of testimony thereby before said referees, * * * and that they continue said hearing from day to day until, with all practicable dispatch, *they shall have determined the issues of law and fact* pending between said parties in said case." As shown by the report, they did fully determine upon all the issues in the case, both of law and fact, and in so doing, they assumed the judicial garb, exercised judicial functions, and were clothed in the capacity and character of a Court to which a cause is submitted for trial. By the provisions of Section 5 of the Practice Act of June 1, 1872, the practice, pleadings, and forms and modes of practicing in the case, while in the District Court of the United States for the Northern District of Ohio, would conform as nearly as possible to those existing at the same time, in the Courts of Record of the State of Ohio. And the reference, made by the Court, was made pursuant to, and under and by virtue of the Ohio Code of Civil procedure, governing in like cases in the State Courts. And in the construction of this section of the Code, the decision of the State Courts would be respected, for "the Federal Courts follow the decisions of the State Courts on the construction of State Laws, unless they come in conflict with the Constitution or laws of the United States." 1 *Kents Commentary*, 342 (*note*); 10 *Wheaton*, 159; 1 *Paine*, 564.

Section 283, of the Ohio Code of Civil Procedure, reads as follows: "The trial before referees is conducted in the same manner as a trial by the Court. They have the same power to summon and enforce the attendance of witnesses, to administer all necessary oaths in the trial of the case, and to grant adjournments as the Court upon such trial. They must state the facts found, and the conclusions of law separately, and their decision must be given and may be excepted to and reviewed in like manner. *The report of the referees upon the whole issue stands as the decision of the Court*, and judgment may be entered thereon in the same manner as if the action had been tried by the Court. When the reference is to report the facts, the report has the effect of a special verdict."

This section, of itself, appears to be conclusive, to the effect that the referees sat as Judges, and not as Jurors; and their report may be reviewed in like manner as the decision and judgment of a Court. It is only upon the principle that they are substituted for the Court, and in fact and in law, sit as a Court, that the concurrent judgment of two, or a majority of the referees, constitutes a decision and report, binding and valid in law, as between the parties. Were it true that their report assumed the character, and had the effect of the award of arbitration, or the verdict of a jury, then the judgment of all must concur, and all must agree to, and sign the report. The case of *The Wesleyan Cemetery vs William Woodruff* decided by the Superior Court of Cincinnati, is directly in point. The Court in the syllabus lay down the rule as follows: "Referees, under the code, *possess judicial functions*, with the exception of the power to render judgment and issue execution, they possess all the authority of the Court which appoints them. The report of a majority of referees—is their judgment, under the submission, and unless set aside for sufficient cause, is final." Justice Storer, in delivering the opinion of the Court, in this case, says: "We suppose that referees, when appointed under the code, possess judicial functions; that the authority conferred is to hear and determine the cause, for we find it stated, 'the trial before them shall be conducted in the same manner as a trial by the Court; their report upon the whole issue shall stand as the decision of the Court, and judgment may be entered thereon in the same manner as if the action was tried by the Court; when the reference is to report the facts, the report shall have the effect of a special verdict.' With the exception of the power to render judgment and issue execution, it would seem the referees possessed all the authority of the Court who appointed them, to hear and decide upon the matters submitted. It is well settled that where a trust or authority is delegated to several persons for mere private purposes, *the concurrence of all is necessary to its due execution.* Kyd on Awards, 106; 6 Johns, 40, Green vs Miller; 5 Ohio, 489, Young vs Buckingham; Co. Litt., 181, b. But when the power conferred is of a public nature, *or to decide a question judicially*, a majority of those vested with authority may determine the question, though as a general rule all ought to be present to hear the proofs and arguments adduced by the parties interested. 1 Bos. & Pul., 229, Grindley vs Barker; 2d ib., 31, Cook vs Loveland; 1 Johns, 500, Orvis vs Thompson; 3 T. R., 592, Rex vs Beeston; 5 Ohio, 489, Supra. * * * This principle regulates the action of every judicial tribunal, *and is that upon which the majority of the Judges to determine all facts litigated before them, depends.* The organization of Courts is but the deputation of power, confided by the government of the country, and the commission granted to those who administer the law contemplates, not unanimity in the opinion of all, but their joint award only. It can be required of jurors alone, that they should all agree before a verdict can be rendered." 2 *Disney's Reports*, 216–217. So, in the case of *Graves vs Blanchard and others*, which is a case where a referee was appointed, and in his report adjudged between the parties as to costs. A motion was filed to vacate the report as to the question of costs, on the ground of want of jurisdiction, and the question was disposed of in the Supreme Court of New York. The Court say: "A referee, to whom the whole cause is referred, has power, and is required in cases following under Sec. 306, of the Code of Procedure, to decide the question of costs. His power, in this respect, is the same as that of a Judge of this Court, at special term." The section of the New York Code, under which this holding was made, is the same substantially, and almost identical in language, with the section referred to in the Ohio Code. And as quoted in the case referred to, it is in these words:

" The report of the referee or referees, *upon the whole cause*, or upon the whole of any issue therein, shall stand as the decision of the Court, in the same manner as if the cause or issue had been determined by the Court, at a special term, and may be reviewed in like manner." Willard Justice, in delivering the opinion of the Court, says; " Had this cause been determined at a special term, on pleadings and proofs, the decree would have embraced every question litigated in the cause, whether it related to the costs merely, or to the other relief sought. An appeal would have lain from the whole, or any part of the decree. *The referee stands in the place of the Judge holding the special term.* Having heard the whole cause upon its merits, he is the most fit person to decide upon the question, whether under Section 306, of the code, costs should be allowed, or not, and if so, to which party. That section says that costs may be allowed or not, at the *discretion of the Court. The referee* to whom the whole cause is referred, *is the Court* to whose discretion this matter is confided. It is idle to say he is not the Court for this purpose, if his decision is to stand as the decision of the Court, and is open to appeal in like manner. A referee, under the code, is not merely a substitute for a Master, under the former practice, *but is clothed with the power of a Judge at special term.* When a specific question is referred to him, his office resembles that of a Master; when the whole issue is referred to him, *he takes the place of the Court;* his report thereon stands as its decision, and may be reviewed in like manner." 4 *Howard's Practice Reports*, 300, 302, 303. Again, the case of *Lawson vs Bissell*, announces the same doctrine, and holds that the report of referees under the code, does not stand as the award of arbitrators, final and unalterable; but that as to it, a right of appeal exists, and that the report is vacated by the appeal. The syllabus of the case states: " An appeal from the Common Pleas to the District Court, vacates the report of referees under the code; and the case stands for triol as if no reference had been made below." And J. R. Swan, Justice, in delivering the opinion of the Court, says: "When the reference is to report facts only, the report has the effect of a special verdict; if the reference is of the facts and law, the facts and the conclusions of law are stated separately, *and the report stands as the decision of the Court;* and judgment may be entered thereon as if the action had been tried by the Court. The decision of the referees, however, may be revised by the Court. These provisions of the code show very clearly that while the trial before referees is subject to the review and revision of the Court ordering the reference, *it is a substitute for a trial in Court.* The finding of facts is, in effect, the special verdict of a jury. The conclusions of law of the referees stand as the law decision of the Court; and if not set aside, a judgment follows of course." 7 *Ohio State Reports*, 129, 133.

Report signed by only two

This doctrine is affirmed by the Court, in the case of *Rhodes vs Baird*, and the right to a second trial is held to exist. The Court say: "The report of the referees must be regarded either as an award of arbitrators at common law, or as the report of referees under the code. *As an award it was invalid, inasmuch as it did not follow the terms of the submission. The submission was to the arbitrament of three persons. The award was made by only two.* As a report by referees, the code declares its effect to be the same *as a decision by the Court.* Giving it this effect, either party had the right to demand a second trial, the case being one for second trial instead of appeal." 16 *Ohio State Reports*, 582. In the case at bar, the report is signed by only two of the referees. There was no unanimity. It was not the judgment of the *three* men appointed as referees. It was only the judgment of a majority. So that, as the award of arbitrators, or as the verdict of a jury, the report is entirely void. To give it any binding force or validity, in that respect, the referees must be held to be a Court, sitting at special term.

Referees must be sworn.

In this case, the referees, appointed by the Court, were not sworn to perform their duties as such in the premises, as will be seen by reference to the agreed statement of facts, on page 24 of the Record. It reads as follows: "It is agreed by the said parties that as a matter of fact, the referees before whom the above entitled action was tried, and who made their report thereon, were not as such referees sworn or affirmed to perform their duties as such referees in the trial of said action." The statement of facts then proceeds to say that nothing was by either party said about the swearing of the referees, upon the trial of the action. And it is no answer to this objection, to say that silence during the trial, constituted a waiver by implication. It is a defect in qualification not capable of being waived by implication. Possibly, the oath of referees, appointed under the rule of common law, might be so waived, yet, even that is a doubtful and mooted question. But where, as in this case, they were appointed by statute, surely nothing short of an express waiver would be effectual to exempt the referees from the qualifications required by the statute under and by virtue of which they were appointed.

Section 288, of the Ohio Code of Civil Procedure, reads as follows: "The referees must be sworn or affirmed well and faithfully to hear and examine the cause, and to make a just and true report therein according to the best of their understanding. The oath may be administered by any person authorized to take depositions."

No judicial construction has been placed upon this section, but its terms are clear and explicit, "*The referees must be sworn or affirmed,*" *etc.* Referees appointed under this section are creatures of the statute by and through which they are created. The appointment is but a component part in the creation of referees. *They are not referees* until they have done all things required by the statute to constitute them as such. Two things are required, the appointment and the oath, are prerequisite qualifications, to their existence as referees, or to their binding action as referees Referees, then, sitting as a Court, must look to their own qualifications. It is obligatory upon them, as it is upon a Judge of a Court, to know of and for themselves, that they are legally and fully qualified as such. to act in their official capacity. Will it be said, that a man going into a Court House to try a case, must first look to the qualifications of the Court, before whom the case is about to be tried?—and that if he fails to do this, and it is afterwards determined that the Judge before whom the the trial was had, and by whom judgment was rendered, was wholly unqualified to sit and act in his official capacity, that the judgment of that Court, let it be never so iniquitous, shall be binding upon him? Certainly no such doctrine as that would ever be held, as to either constitutional or statutory Courts. Such a rule would effectually and forever, undermine all safeguards to judicial proceedings. Should not all Courts, in this respect, stand upon the same basis? Is there any good reason why such a rule should be made applicable to one Court, and not to another? The case at bar was an important one. It was referred to three distinguished lawyers, chosen from three counties. Were the parties bound to presume that they did not know their duty—or knowing it, would not do it, in respect to their qualifications? Such a rule would do violence to the capacity and integrity of the referees. We think it may be conceded, that parties litigant are bound to look to the qualifications of jurors, and, perhaps, arbitrators appointed under common law. But certainly there is no precedent or authority which goes so far as to apply the same rule to Judges, setting at either regular or special terms, and trying cases as a Court. If then, we are correct in our theory, that an express statutory requirement and qualification, in the creation of a Court, could not be waived by implication in proceeding to try a cause before that Court, without first examining and determining as to its qualifications to act as such, then the action of the referees, and their report in the premises is wholly null and void; and as a consequence the District and Circuit Courts, erred in overruling the exceptions thereto; and in rendering and affirming the judgment in the report of the referees.

OLDS & DICKEY,
Attorneys for Plaintiff in Error.

Shellabarger & Wilson

In the Supreme Court United States.

STEPHEN L. NEWCOMB, PLAINTIFF IN ERROR,

vs.

JOHN WOOD, ASSIGNEE IN BANKRUPTCY.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR.

Inasmuch as, in the brief prepared by Messrs. Olds & Dickey, the attorneys who tried this case for the plaintiff in error in the court below, there has been an omission to assign the errors as required by the law, we now, preliminary to the assignment of errors, and for convenience, restate the facts of the case.

STATEMENT OF FACTS.

The defendant in error, as assignee in bankruptcy of Philip E. Robertson, brought suit in the District Court of the United States for the Northern District of Ohio against the plaintiff in error, Stephen L. Newcomb, to recover the value of a stock of goods sold by Robertson (the bankrupt) to the plaintiff in error, upon the ground that the sale had been made within four months prior to the bankruptcy; that it was made for the purpose of giving a preference, &c. On the petition, an issue of fact was made by the answer of the plaintiff in error, and a reply thereto. After issue joined, by consent of parties the cause was referred to Henry C. Hodges, Joseph C. Devon, and A. K. Dunn as referees, who were fully authorized and empowered to hear and determine all questions of law and fact in issue. (See Record, p. 12.) This reference was made in open court, and made a part of the records of the court. Afterwards, a report was made signed by two of the persons named as referees. (See Record, pages 13 and 14.) The referees were not sworn. (See Record, p. 15.) An exception was filed to the report, upon the ground that the referees were not sworn. (Record, p. 14.) This exception was overruled by the court, to which exception was taken by the plaintiff in error. The report was affirmed and judgment rendered thereon. (See Record, pp. 15 and 16.) To the rendition of this judgment the plaintiff in error excepted. (Record, p. 16.) Thereupon plaintiff in error moved the court for a second trial of the case, which was refused, and to which action the defendant excepted. (See Record, p. 16.) Plaintiff in error then asked to appeal the case to the Circuit Court, but the appeal was refused, and thereupon he filed his petition in error to the Circuit Court. (See Record, pp. 4 and 5.) On the writ of error issued pursuant to this petition, upon hearing had, the Circuit Court affirmed the judgment of the District Court. (Record, p. 18.)

Assignment of Errors.

1st. The said District Court had no jurisdiction to appoint, and erred in appointing, referees in said cause.

2d. The said court erred in overruling the exceptions to the report of said referees.

3d. That the court erred in rendering judgment upon said report, the said report having only been signed by two of the persons named as referees, and none of the persons named as referees having been sworn.

4th. The said court erred in refusing to grant a second trial of said action.

5th. The said District Court having no jurisdiction to appoint referees, the said report was nugatory, and could not be made the basis of a judgment; and if said submission to said three persons is to have any effect, it can only be regarded as an award at common law; and as such it was void, because only signed by two of the persons named; and the court erred in rendering the judgment upon such a report or award.

ARGUMENT.

In addition to what has been presented by the brief already filed, we submit that this case should be reversed, because plaintiff in error was DENIED A SECOND TRIAL.

The statute of Ohio is as follows:

> "A second trial may be demanded and had in any civil action which has been heretofore, or may be hereafter, instituted in any Court of Common Pleas in this State, in which said court has original jurisdiction, and in which either party has the right, by law, to demand a trial by jury, and in which an issue of fact has been joined between the parties, or any two of them, by their pleadings in the action, and after a judgment or final order has been, or may be, rendered, upon the terms and in the manner hereinafter provided; and new trials may be granted in such actions, after such second trial thereof, upon the grounds and in the manner provided for the granting of new trials by the code of civil procedure." (2 S. & C. Stat., 1155.)

The statute of that State, in respect of the appointment of referees, is as follows:

> "All or any of the issues in the action, whether of fact or of law, or both, may be referred, upon the written consent of the parties, or upon their oral consent in court entered upon the journal." (Swan's R. S., p. 659, sec. 281.)
>
> "The trial before referees is conducted in the same manner as a trial by the court. They have the same power to summon and enforce the attendance of witnesses, to administer all necessary oaths in the trial of the case, and to grant

adjournments, as the court upon such trial. They must state the facts found and the conclusions of law separately, and their decision must be given, and may be excepted to and reviewed in like manner. The report of the referees upon the whole issue stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the reference is to report the facts, the report has the effect of a special verdict." (Id., p. 659, sec. 283.)

This case was one in which a jury trial could be demanded, if the case had been brought in the Common Pleas Court of the State; and in that case it would have been one which could properly be referred, under the statute above quoted, to referees.

Now, the case having been instituted in the District Court of the United States, one of two propositions is inevitable: 1st, the District Court either had authority, derived from the statute of the State, to appoint referees, or, 2d, the court had no authority to appoint referees; for it will hardly be pretended that, in the absence of statutory authority, the court could send parties out to have the cause tried, as was done under the order in this case.

The defendant in error claims that the District Court had the right to make the reference, because, by section 914 of the Revised Statutes of the United States, the District Court is required to conform to "the practice, pleadings, and forms and modes of proceeding in civil causes in courts of record in the State."

If the District Court had the right to send the case to referees, it had that power under this section; and if the law of the State controls the Federal court in this regard, then we submit that it necessarily follows that every other rule prescribed by the State law, touching proceedings and practice in the State courts, are to have force in the Federal court. In the matter of the appointment of referees under this statute by the State court, the statute is permissive, not mandatory; and if it applies as a rule of procedure in the Federal court, it is the same.

Now, granting that this statute does apply to the Federal court, and confers upon it the authority claimed, we refer the court to the other section above quoted, in regard to a second trial. In this case the statute is peremptory. Either party may demand a second trial, and the court has no discretion in the matter, but must grant it. And if the statute above referred to, in respect of the appointment of referees, is a part of the proceedings in the State court to which the Federal court must conform, then there is no reason why this statute providing for a second trial is not equally a rule obligatory upon that court.

The second trial is a part of the legal machinery of adjudicating a case in the State court. The Legislature of that State has provided by this statute that the case is not ended with one trial, if either party demands another. A part of the proceedings under this statute in the State court is a second trial. A second trial is one of the "procedures" that enter into the "modes of procedure" which the Legislature has prescribed for the State courts. A trial is certainly a part of the "modes of procedure"; but by this statute, after a trial has been had, the case is not ended, if either party sees proper to demand another; and a second trial is the next "procedure" in the cause.

We insist, therefore, that by the provisions of section 914, Revised Statutes, the District Court was bound to grant a second trial.

And there is another reason for what we here contend for.

The State courts had jurisdiction of this case. The assignee of the bankrupt might have sued the appellant in the State court. (Bump on Bank., 221, 222.) In that event, undoubtedly the appellant would have been entitled to the second trial. The Federal and the State courts have concurrent jurisdiction. It is not to be presumed, in the light of section 914, that Congress intended to permit the assignee, by going into the Federal court, thereby to deprive the appellant of any right he would have had if the suit had been brought in the State court. On the contrary, the spirit and, as we contend, the letter of section 914 is to give to parties in the Federal courts in any State the benefit of whatever the Legislature of the State has considered to be necessary to a thorough adjudication of the rights of its citizens. Any other construction of section 914, it seems to us, would fall short of the intention of Congress.

To illustrate: Some of the States have enacted statutes to the effect, that, in actions of ejectment, a party shall, as a matter of right, have a new trial, and that once a judgment has been rendered, that judgment shall be a bar to future actions. This legislation is to avoid multiplicity of suits and to settle titles. It authorized a party to have two trials, and after that the controversy is ended, unless reversed. This is one of the safeguards created by the law of the State to the property rights of the citizen. It cannot be that in such a case the citizen of the State, in the face of section 914, can be deprived of this safeguard which his State has given him, by avoiding the State tribunal and going into the Federal court.

If such could be the case, the effect would be, either that by reason of the statute making a judgment in ejectment a bar, a party would be barred by *one* trial, when the laws of his State had said that he should not be barred until he had had *two*, or it must be held that a judgment in the Federal court is not at bar, and that in that court the parties might go on, as under the old rule, repeating ejectment suits until the court would interfere by injunction and end them. The construction we contend for makes the rights of property uniform in both courts: it makes harmony, while the other view only makes confusion. (*Brine* v. *Ins. Co.*, 96 *U. S.*, 631.)

If what we have said is true as to real property, the principle must apply in the case at bar; and therefore there is error in this record, in that the court refused the plaintiff in error a second trial.

But if the right to a second trial will not obtain in the Federal court, then we contend that the right to appoint referees does not inhere in that court by reason of section 914, and therefore that no such right exists. In that event, the appointment of these referees would be nothing more than a common-law arbitration; and hence any failure to conform to the terms of the submission would make the award void, although it was stipulated that it should be a rule of court.

In this case, the parties consented to a reference to those persons named, authorized them to determine all questions of law and fact, and report their findings to the court. (Record, p. 12.) The report or award (pp. 13 and 14) was signed by but two. As an award in an arbitration at common law, this was void, because not signed by the three persons to whom the matter was submitted. The rule is thus stated: "A submission to arbitration has been uniformly considered to be a delegation of power for a mere private purpose; consequently, where there is no express power to a majority to make an award, they must all join." (*Caldwell on Arbitrations, pp.* 202, 203, *and note; Patterson* v. *Leavitt*, 4 *Conn.*, 50; *Town* v. *Jackwith*, 6 *Mass.*, 46.) In the case of *Rhodes* v. *Beard*, 16 *Ohio Statutes, p.* 582, a submission was made, by consent of the parties, as in this case, to three referees. Only two signed the report. The court says:

> "The action of the referees must be regarded either as an award of arbitrators at common law, or as the report of referees under the code. As an award, it was invalid, inasmuch as it did not follow the terms of the submission. The submission was to the arbitrament of three persons. The award was made by two only. As a report by refer-

ees, the code declares its effect to be the same as a decision by the court. Giving it this effect, either party had the right to demand a second trial, the case being one for second trial instead of appeal."

These authorities settle the question, if there was any room to doubt it, that this award was worthless, and that it was error for the court to render a judgment upon it. Here, the parties had agreed to a reference of these matters in dispute to three named persons. That agreement was made in open court, and entered on the records of the court in that case. Now, those three persons never made any report to the court in the case, and hence the paper that was presented to the court by two of them was void, and the court had no more power to render a judgment upon it than it would have to render judgment if no report whatever had been made. No exception to this paper, because not signed by the three, was necessary. The court, by its own records, knew that three persons had been appointed, and that those three had not made a report. Hence, when a paper was presented not signed by the three, the court had nothing upon which to predicate a judgment; and all that it was necessary for plaintiff in error to do was to except to the rendition of the judgment. This he did. This is an error in the record itself, manifest upon its face. (See Record, p. 16.) The record shows that the judgment was rendered upon the report alone. (Record, pp. 15 and 16; *Insurance Company* v. *Piaggio*, 16 Wall., 386.)

Referees not Sworn.

If these three persons are to be considered as referees appointed under the Ohio code, then they must be sworn or affirmed. Section 288 of the code, quoted in the brief of Messrs. Old and Dickey, shows this. It is not necessary that we shall enlarge upon the argument they have made on that subject, and will only call the attention of the court to the statement of facts.

From that, it will be seen that the conversation about swearing the referees occurred before any trial before them. How long before is not stated. There was no waiver of any of the requirements of the law.

By sending the case to referees, the court transferred the determination of all questions, both of law and fact, to them. It virtually made them the court. The statute provided for doing this, but when providing for thus removing the trial to another forum, it also provided that that special tribunal which was to take the place of the court should be sworn. They were not referees until sworn. It might as well be said that a man who had been appointed judge could hold a court before he had qualified.

We ask that the judgment be reversed.

Shellabarger & Wilson,
Attorneys for Plaintiff in Error.

No. 72.

SUPREME COURT
OF
THE UNITED STATES.

STEPHEN L. NEWCOMB,
Plaintiff,

VS.

JOHN WOOD,
Assignee in Bankruptcy of
Philip E. Robertson, Defendant.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

ARGUMENT FOR DEFENDANT IN ERROR.

WALTER H. SMITH,
AND
COOPER, PORTER & MITCHELL,
Attorneys for Defendant.

WASHINGTON, D. C.
R. O. POLKINHORN, PRINTER,
1878.

Supreme Court of the United States.

STEPHEN L. NEWCOMB,
Plaintiff,
vs.
JOHN WOOD, Assignee in Bankruptcy
of PHILIP E. ROBERTSON,
Defendant.
In Error.

The facts of this case are very fairly stated in the argument of the plaintiff in error. They are, in brief, as follows: Wood, as assignee in bankruptcy of Robertson, brought his action against Newcomb in the United States district court for the northern district of Ohio, alleging that Robertson, in fraud of the bankrupt act, had wrongfully and fraudulently made a transfer of a stock of goods and merchandise to Newcomb. This the defendant denied; and after issue joined the parties by *consent*, and under the order of the court, referred "all questions, both of law and fact, in issue and pending between the parties," to three referees, Henry C. Hedges, Joseph C. Devin, and A. K. Dunn. These referees, without first being sworn, jointly heard all the evidence and jointly considered the case, but only two of them signed their report to the court.

They found for the plaintiff. The defendant excepted to their report solely on the ground that the referees were not sworn. The district court overruled the exception, confirmed the report, and gave judgment against the defendant for the sum of $6,356.90.

The defendant thereupon sued out a writ of error to the circuit court, and in that court obtained leave to amend, and did amend, his assignment of errors. The circuit court affirmed the judgment of the district court, and from that judgment a writ of error has been brought to this court.

The errors assigned in the petition in error are—

1st. That the circuit court erred in holding that the district court had jurisdiction to appoint said referees.

2d. That it erred in holding that the report of the referees was legal, they not having been first sworn.

3d. That it erred in holding said report legal, it having been signed by two referees only; and,

4th. The general assignment that there was error in rendering said judgment.

Counsel for plaintiff in error have omitted from their brief the first assignment of error, and therefore, under the 21st rule of this court, it will not be considered unless the court should request its consideration. That request, we apprehend, will not be made, for the question is really too plain for doubt.

Section 281 of the Ohio code provides that "All or any of the issues in the action, whether of fact or law, or both, may be referred upon the written consent of the parties, or upon their oral consent in court, entered upon the journal."

2 Swan & Ce., Stat. 1027.

In this case the consent of the parties was entered upon the journal, and there were issues of fact, made by the pleadings.

It was, therefore, expressly provided for in the code, and, under section 914 of the Revised Statutes, it was the duty of the United States court to conform to the practice in the State court.

2. The referees were not sworn.

It is true that the 288th section of the Ohio code provides that "the referees must be sworn or affirmed well and faithfully to hear and examine the cause;" but if the parties appear and go on with the hearing of the cause without the referees being sworn, and without objection, it is well settled that this is a waiver, and that thereafter neither party can except on that account.

In this case the agreed statement of fact shows that the subject of swearing the referees was mentioned by counsel of plaintiff in error in a conversation with one of the referees (Record, page 24); "in which conversation Mr. Olds [the counsel] did not in any way express an opinion that said referees should not be sworn, and did not at any time *expressly* waive any of the requirements of law with reference to the swearing of the same."

He and his client did, however, proceed with the case without requiring that the referees should be sworn, and that, too, after the subject had been distinctly called to his mind. That was a waiver.

In Edwards on referees, p. 107, it is said: "The fact that a referee has not been sworn in a cause sent to him will not affect his finding where parties appear before him and argue without raising any objection."

In *Whelen* vs. *Supervisors*, 6 How. Prac., 278, the referee had not been sworn and objection was made on that account after his report was in. The court said: "These defects, such as they were, were waived by the plaintiff appearing before the referee and arguing the cause without any objection."

In *Keator* vs. *Ulster & Del. Plank Road Co.*, 7 do., 43, the court said:

"A referee is required by law to take a prescribed oath before entering upon his duty, and yet, it often happens that no such oath is taken. If the parties proceed with the reference without objection, they are held to have waived their right to object."

We claim that the plaintiff in error cannot insist upon this objection unless it appears affirmatively from the record that neither he nor his counsel knew that the referees were not sworn.

In *Eastman* vs. *White*, 4 Ohio State, 160, it was objected that one of the jurors was not an elector. **Ranney**, Judge, said: "It is certainly clear that all jurors must have the qualifications of electors; and if one, not having such qualifications is retained upon the pannel without the knowledge of the party or his counsel, and after reasonable diligence used to ascertain the fact, when the jury is empanneled, a new trial should, for that cause, be granted. But it is equally clear that the proper time to take the objection is at the empanneling of the jury, and it must be taken to have been waived, unless the party is able to show to the court, upon the hearing of the motion, that with the exercise of such diligence he could not have taken the exception at the proper time. This is indispensable to prevent constant mistrials and to protect the rights of the adverse party; otherwise, the party afterwards taking the objection might lie by and take the chances of a verdict in his favor, and, if given adversely, be entitled to a new trial as a matter of course. We have, therefore, settled that to lay a proper foundation for a new trial for such cause, it should be shown to the court that the disqualification of the juror was unknown to the party *and his counsel* at the time the jury was empanneled, and that reasonable diligence was used before the jury was sworn, by inquiry of the juror, or otherwise, to ascertain whether such objection to his sitting existed."

In *Parks* vs. *The State of Ohio*, 4 do., 234, which was an indictment for murder, a motion was made for a new trial on the ground that one of the jurors, previous to his being called as a juror, had expressed an opinion that the defendant was guilty. The court held that the objection was not well taken, because the record did not show that such fact was unknown to the defendant and his counsel at the time the jury was empanneled. The reasoning of the court was the same as in the preceeding case of *Eastman* vs. *White.*

These decisions commend themselves for their good sense, and are supported by a great many authorities.

Orrok vs. *Commonwealth*, 21 Pick., 471;
Kent vs. *City*, 2 Gray, 281;
Hallock vs. *County*, 2 Met., 560;
Fowler vs. *County*, 6 Allen, 95.

If a defendant in a criminal case is bound to show a want of knowledge on the part of himself and his attorney about matters which neither of them can be presumed to have personal knowledge, how much more ought a party in a civil case to be bound to show that neither he nor his attorney knew that the referees who were trying his case had not been sworn?

The presumption is that he would know, because such swearing ordinarily takes place in the beginning of the trial and in the presence of both parties and their attorneys.

In this case the attorney did know that fact, but chose to make no objection on that account, but to "lie by and take the chances of a verdict in his favor," and then to insist upon it as ground for a reversal.

We think this should not be allowed. No case can be found where it has ever been permitted. Certainly none have been cited by the diligent counsel on the other side, and we have been unable to find one. We close this branch of the case by adopting the language of Chief Justice Shaw in *Hallock* vs. *County, supra:* "A party litigant, knowing of matter of personal exception to a juror, lies by, taking his chance for a favorable verdict. If, when that verdict is against him, he could go back and take the exception, it would work great injustice. By consenting to go on, with a knowledge of the exception, he consents to abide the result, whether favorable or unfavorable."

3d. The report was signed by two referees only.

It would be a sufficient answer to this assignment of error to say that no such exception was taken, in the district court, to the report. That court was bound only to consider and decide the objections that were made before it. It was not required to look into the record and search for errors not pointed out or relied upon by the parties. Perhaps it might, of its own motion, have done so, but it was not in law under obligation to, and did not do it.

The question now before this court is, whether the district court erred. If it decided correctly all the exceptions made to the report, then it did not err, and the circuit court did not err in affirming its judgment. The circuit court had discretionary power to allow amendments, but it had *no power by an amendment to make error in the proceedings of the district court, when there was no error, without such amendment.*

It is well settled that the reviewing court must be confined to the errors assigned in the court reviewed.

In *Wells* vs. *Martin*, 1 Ohio State, 388, Thurman, Judge, said: " A revisory court will not look for errors that are not assigned. Parties will not be allowed to waive the assignment and throw upon the court the task of hunting errors. Nor will the plaintiff be permitted to allege errors, *viva voce*, at the hearing which he has not assigned."

In *Davis* vs. *Hines*, 6th Ohio State, 478, the Court said: " In this court the plaintiff in error has assigned, generally for error, that the district court erred in affirming the judgment of the common pleas; and under the general assignment has attempted, by way of subdivision, to assign errors on the record of the proceedings in the common pleas, which were not assigned in the petition in error filed in the district court. This cannot be allowed. It was competent, doubtless, for the district court, if it thought proper and had leisure to do so, to embark in a voyage of discovery in quest of errors not assigned, but it was under no obligation to do so; and we will not reverse its judgment if we find that it has correctly decided the questions presented by the plaintiff in error in his pleading."

In *Booth* vs. *Shepherd*, 8 Ohio State, 243, it was held that a reviewing court is not bound to notice errors which are not specifically assigned; and will not do so where substantial justice does not require it to be done.

In *Bell* vs. *Bruen*, 1 How., U. S., 169, it was held that the Supreme Court would not express an opinion upon a matter of defense which was not brought to the consideration of the court below.

See also *Klein* vs. *Russell*, 19 Wall., 463.

In *Marine Bank* vs. *Fulton's Bank*, 2 Wall., 252, this court held that when a trial had proceeded on its merits, and no error had been pointed out in the court below, the judgment wonld not be reversed, even though the form of action had been wholly misconceived, and there was a complete defence to the action as brought. 94. U. S. 1.

If, therefore, it would have been technically erroneous to confirm a report made by two out of three referees only, if objection had been made, it was not error to do it when no exception was taken on that account. And it was too late to make it in the reviewing court. But we further claim that the report was good and sufficient in law, and that if exception had been taken it should and would have been overruled.

The well settled rule, to be found in all the books, is, that, when authority is given to several persons for private purposes only, all must unite in judgment; but where the authority is given for public purposes, or is given to a judicial tribunal or requires judicial action, then the decision of a majority must govern.

Counsel for plaintiff in error have taken great pains to show that these referees sat as a court and acted judicially, and have cited numerous authorities to support their position; for all of which we should be greatly obliged to them had we not heretofore furnished them with the authorities on the hearing in the circuit court.

We call attention to the 283d section of the Ohio code, which expressly provides that the report of the referees shall stand "*as the decision of the court.*"

And the case of the *Wesleyan Cemetery* vs. *Woodruff*, 2 Disney, 216, where it was held by Judge STORER of the Supreme Court of Cincinnati, in a well considered opinion, that referees possess judicial functions, and that a report of a majority is final. The judge said: "We suppose that referees, when appointed under the code, possess judicial functions; that the authority conferred is to hear and determine the cause, for we find it stated 'the trial before them shall be conducted in the same manner as a trial by the court. Their report upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon in the same manner as if the action was tried by the court; when the reference is to report the fact, the report shall have the effect of a special verdict.' With the exception of the power to render judgment and issue execution; it would seem the referees possessed all the authority of the court who appointed them, to hear and decide upon the matters submitted.

It is well settled that where a trust or authority is delegated to several persons for mere private purposes, the concurrence of all is necessary to its due execution. Kyd on Awards, 106; 6 Johns., 40, *Green* vs. *Miller*; 5 Ohio, 489, *Young* vs. *Buckingham*. *Co.* Litt. 181, *b*. But when the power conferred is of a public nature, or to decide a question judicially, a majority of those vested with authority may determine the question, though, as a general rule, all ought to be present to hear the proofs and arguments adduced by the parties interested. 1 Bos. & Pul., 229, *Grindly* vs. *Barker*; 2 *ib*. 31. *Cook* vs. *Loveland*;

1 Johns., 500, *Ower* vs. *Thompson;* 3 Term, 592, *Rex* vs. *Beeiton;* 5 Ohio, *supra.* This principle regulates the action of every judicial tribunal, and is that upon which the right of the majority of the judges to determine all facts litigated before them depends. The organization of courts is but the deputation of power, confided by the government of the country, and the commission granted to those who administer the law contemplates not unanimity in the opinion of all, but their joint award only. It can be required of jurors alone, that they should all agree before a verdict can be rendered."

In the case of *Graves* vs. *Blanchard*, 4 How. Prac., 300, it was held that the power of the referee was the same as that of the judge; and in *Lawson* vs. *Bissell*, 7 Ohio State, 129, that the report of referees stands as the decision of the court; that their finding as to facts is "in effect the special verdict of a jury," and their conclusions of law "stand as the law decision of the court;" and in *Rhodes* vs. *Baird*, 16 Ohio State, 582, that a report made by two out of three referees stood as the decision of the court.

Cooly v. O'Connor
12 Wall. 398.

To the same effect are *Short* vs. *Pratt,* 6 Mass., 496; *McInroy* vs. *Benedict,* 11 Johns., 402; *Harris* vs. *Norton,* 7 Wend., 534; and *Clark* vs. *Fraser*, 1 How. Pr., 98.

We deem it unnecessary to cite further authorities, as counsel for plaintiff, upon this point, seem to be in accord with us, *judging from their brief.*

We are satisfied that there was no error in the judgment of the circuit court, and we ask that it may be affirmed.

WALTER H. SMITH,
COOPER, PORTER & MITCHELL,
Attorneys for Defendant.